

FEDERAL CIRCUIT COURT OF AUSTRALIA

*KAUR & ORS v MINISTER FOR
IMMIGRATION & ANOR*

[2017] FCCA 844

Catchwords:

MIGRATION – Bogus document – merits review – requirements of PIC 4020(1) and (2).

Legislation:

Migration Act 1958 (Cth), s.5(1)

Cases cited:

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

First Applicant:	BALIHAR KAUR
Second Applicant	KAMALJIT SINGH
Third Applicant	YUVRAJ SINGH
Fourth Applicant	MASTER JAZZVEER SINGH BRAR
Respondent:	MINISTER FOR IMMIGRATION AND BORDER PROTECTION
Second Respondent	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	MLG 1679 of 2015
Judgment of:	Judge McNab
Hearing date:	24 March 2017
Date of Last Submission:	24 March 2017
Delivered at:	Melbourne
Delivered on:	24 March 2017

REPRESENTATION

The First Applicant In Person

Solicitors for the Respondent: Australian Government Solicitor

ORDERS

- (1) The application be dismissed.
- (2) The Applicant pay the First Respondent's costs, fixed in the sum of \$6200.
- (3)
- (4)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT MELBOURNE

MLG 1679 of 2015

BALIHAR KAUR

First Applicant

KAMALJIT SINGH

Second Applicant

YUVRAJ SINGH

Third Applicant

MASTER JAZZVEER SINGH BRAR

Fourth Applicant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

**DELIVERED EX –TEMPORE (REVISED FROM
TRANSCRIPT)**

1. By an application filed by the applicants on 22 July 2015, the applicants seek judicial review of a decision of the Administrative Appeals Tribunal ('the Tribunal') dated 24 June 2015. By that decision, the Tribunal affirmed a decision of the delegate of the Minister to refuse the applicants' skilled provisional class VC, subclass 487 visas.
2. The applicants are citizens of India. Mrs Balihar Kaur is the principal visa applicant. The other applicants are the first applicant's partner and two children.
3. The applicants relied upon an affidavit sworn by the first named applicant, Mrs Kaur, sworn 22 July 2015 ('the affidavit'). The affidavit deposed that the work reference submitted for the purpose of a skill assessment application at the TRA in December 2009 was genuinely obtained after working at a hair salon, and that the applicants were not given a fair assessment by the Tribunal. The affidavit states at [1]:

Despite having worked at the salon I was assessed as a fraudulent applicant based on the information obtained by the Department of Immigration from an already convicted person named in the MRT decision.

4. The other matter raised by the first named applicant is the claim that the Migration Review Tribunal requested her to provide further information in relation to a work reference, nearly five years after her having worked at the salon. She states that despite her best efforts, the former provider of the work experience would not provide anything to assist her.
5. The matters raised in the affidavit are, in substance, matters that were raised by the applicant before the Tribunal in relation to the genuineness of documents.
6. The grounds of the application before this Court replicate the matters raised in the affidavit.

Background

7. The relevant facts in the chronology in this matter are accurately set out in the contentions in fact and law prepared on behalf of the first respondent.

8. The applicants are citizens of India. Mrs Kaur is the principal applicant for the visa. The application for the visa included a statement that the applicant had a suitable skills assessment from Trades Recognition Australia ('TRA') for the nominated occupation of hairdresser.
9. On 24 January 2012 and 29 August 2012, the Department invited the applicant to comment on information which suggested she may not meet the Public Interest Criterion 4020 ('PIC 4020'). The letter included information that a certain individual had pleaded guilty to the manufacture and sale of false references, including one matching the reference that the applicant provided to the TRA.
10. On 14 February 2013, the applicant's migration agent responded to an invitation to comment, stating that the applicant's TRA skill assessment was genuine, but the applicant was unable to provide new or further evidence in relation to hours worked with her then employer.
11. On 3 November 2014 a delegate of the Minister refused to grant the visa and the delegate found that the TRA skills assessment reference submitted by the applicant to the Department was a bogus document, as then defined in s.97(c) of the *Migration Act 1958* (Cth) ('the Act'). The delegate was not satisfied that PIC 4020 should be waived.
12. On 21 November 2014, the applicants applied to the Tribunal for a review of the delegate's decision. Through her representatives acting for her at that time, the first applicant requested access to documents held by the Tribunal. That request was granted on 24 March 2015. On 24 March 2015, the Tribunal wrote to the applicants pursuant to s.359A of the Act, inviting them to comment or respond to information.
13. On 14 April and 18 May 2015, the Tribunal received submissions, together with supporting documents from the applicants' agent, with the principal submission being that the first applicant's work references were genuine, and that the applicant had in fact performed the voluntary work at the hair salon, as asserted in the references.
14. On 19 May 2015, the first applicant and the second and fourth applicants and their representative attended a hearing before the Tribunal.
15. The Tribunal made a decision on 24 June 2015.

Consideration

16. The first applicant's case before this Court is essentially that:
 - a) the documents considered by the Tribunal and the delegate were genuine documents;
 - b) the applicant had genuinely worked the hours as set out in the work reference; and
 - c) the task of obtaining verification of the matters set out in the document was difficult because of the time that had elapsed.
17. In order for the applicant to meet the requirements of PIC 4020, there must be:

(1)...no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made...
18. Section 97(c) of the Act defined bogus document to mean:

a document that the Minister reasonably suspects is a document that...was obtained because of a false or misleading statement, whether or not made knowingly.
19. The definition of bogus document is now found in s.5(1) of the Act in substantially the same form. Section 5(1) applies to all undetermined applications from 18 April 2015.
20. The Tribunal in this case carefully considered the submissions that had been made on behalf of the applicant, and did so at length in the course of its decision. The Tribunal correctly noted the legislative requirements, in particular PIC 4020(1) and (2).
21. The Tribunal considered the submissions made to it in relation to the claim that the applicant had in fact had worked at the hair salon. It also

made reference to an electronic copy of the work reference submitted by the applicant, which had been found on a USB stick belonging to Mr A (whose name is anonymised by reason of a suppression order made in the County Court of Victoria). That reference matched a reference provided by the applicant. The Tribunal noted that Mr A had been investigated and convicted of supplying and creating false documents, as part of a fraudulent scheme.¹

22. The Tribunal placed weight on the fact that Mr A had been convicted of manufacturing and selling false work references on behalf of others, including Rokk Ebony, a hair salon where the first applicant claimed to TRA to have undertaken 900 hours of work experience.² It placed particular weight on the fact that a work reference from that salon with the first applicant's details was found on a USB stick seized during a search of Mr A's property, which was set out in the Court evidence exhibit list provided during Mr A's trial.³
23. The Tribunal explained to the applicants and their representative the relevance and the consequence of the information that it had in relation to the involvement of Mr A in the scheme, and the fact that the first named applicant's name and details was included amongst his documents which were seized from him.⁴ The Tribunal raised this matter directly and asked the first named applicant whether she wished to respond immediately or wanted to have some time before responding.⁵ The matter was adjourned in order to allow for a response to be given.
24. The Tribunal considered the matters raised by the applicants' representative, but found that the document provided was a bogus document in relation to the application for the visa.⁶
25. In my view, that decision was reasonably open to the Tribunal in circumstances where Mr A had clearly identified the salon as a source of persons applying for visas using false documents, and the first

¹ Tribunal decision dated 24 June 2015 [2].

² Tribunal decision dated 24 June 2015 [49].

³ Tribunal decision dated 24 June 2015 [49].

⁴ Tribunal decision dated 24 June 2015 [19].

⁵ Tribunal decision dated 24 June 2015 [19].

⁶ Tribunal decision dated 24 June 2015 [50]-[53].

named applicant's name was included amongst the material seized from Mr A.

26. The first respondent has correctly identified that the application is truly in the nature of merits review.
27. The Tribunal in reaching its finding took into account the assertions that the applicant in fact did undertake 900 hours of work experience at Rokk Ebony, and that she had tried to obtain corroboration from the owner of that business and staff, but without success. The Tribunal held that these factors do not outweigh the evidence that the applicant had submitted a false document.⁷
28. The Tribunal acknowledged that the first named applicant had been able to demonstrate some familiarity with the premises of Rokk Ebony, with the names of various staff, and concluded that it was likely that the first named applicant had done some voluntary work at Rokk Ebony, but was not satisfied that she had completed 900 hours of work experience there.
29. In those circumstances, for the reasons set out in the decision of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272, it is not appropriate for this Court to engage in a reconsideration of the merits of the applicants' case.
30. In relation to the finding by the Tribunal that it would not exercise its discretion to waive the requirements of PIC 4020(1) and (2), the Tribunal took into account the matters submitted by the applicants, in particular the evidence of the first applicant's then current employer that the applicant was a key person in a small hairdressing business and that it would be a major threat to the business if the applicant left it. It also took into account the difficulties faced by the applicant and by her family due to the length of time, at that stage nearly five years, taken by the Department to determine their visa applications; the third applicant's involvement in athletics, and the support given to him by his local athletics club; and the fact that Australia had interests as a signatory of the UN Convention on the Rights of the Child ('CROC'), due to the fact that the third and fourth applicants' interests were covered by the CROC.

⁷ Tribunal decision dated 24 June 2015 [54].

31. The Tribunal considered those matters and made findings in relation to each of the matters submitted.⁸ The Tribunal did not accept that there was substance to the claims in relation to the importance of the applicant to the hairdressing business of her then employer, and that any disruption caused by her absence would be temporary only. It noted that the then employer had not provided any financial information to substantiate the claim that the business's profitability had increased since the first applicant had joined the business, or would be likely to significantly decrease if she left.
32. In relation to the claim of delay, the Tribunal noted that the waiver provisions in PIC 4020(4) do not cover detriment or distress experienced by the applicants themselves.⁹ It held that that while the processing time taken by the Department was lengthy, presumably by reason of the investigation into Mr A, and cannot be condoned, the Tribunal was not satisfied that the delayed processing in and of itself raised compelling circumstances affecting the interests of Australia, as opposed to the applicants themselves.
33. The Tribunal noted the third named applicant's interests as an athlete and his involvement in athletics in a local sporting athletics club.¹⁰ The Tribunal held that whilst it was satisfied that the third named applicant had dedication and achievements, it was not satisfied that the potential demonstrated, but yet to be realised by the third named applicant in track and field events, was a compelling circumstance that affects the interests of Australia.¹¹
34. In relation to the claim and submission that Australia's interests were affected by its status as a signatory to the CROC, the Tribunal considered the circumstances of the child applicants, who it noted were attending primary school and appeared to be settled and progressing well, and noted that the first and second applicants, the mother and father of the fourth named applicant, were concerned that their standards of living would be lower in India and that the opportunities for the fourth applicant would be reduced.¹²

⁸Tribunal decision dated 24 June 2015 [68]-[69].

⁹ Tribunal decision dated 24 June 2015 [72].

¹⁰ Tribunal decision dated 24 June 2015 [73]-[75].

¹¹ Tribunal decision dated 24 June 2015 [74].

¹² Tribunal decision dated 24 June 2015 [76]-[81].

35. The Tribunal was not satisfied that the disruption would have a significant or permanent effect on the third or fourth named applicants, although it acknowledged it would not be easy for them to adjust initially. The Tribunal was not satisfied that their survival and basic standards of living and access to education would be jeopardised if they left Australia, to the degree that it would lead to a breach of the articles of the CROC.
36. It noted that it considered these matters singularly and cumulatively, but was not satisfied that the requirements would be waived. I can discern no error of law in the manner in which the Tribunal exercised its discretion, although I appreciate the decision does have a significant impact on the applicants.
37. In the circumstances, I am of the view that the Tribunal conducted a careful and detailed analysis of the material before it. It set out in detail each of the submissions that were put as relevant to the issue as to whether a bogus document had been submitted, and whether the requirements of PIC 4020 should be waived, and considered those matters.
38. I am not satisfied that the decision of the Tribunal is affected by jurisdictional error and I dismiss the application.

I certify that the preceding thirty-eight (38) paragraphs are a true copy of the reasons for judgment of Judge McNab

Date: 28 April 2017